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IN THE SUPREME COURT OF THE UNITED STATES

October 1943 Term

No. 111

FRED PINE (the appellant below),

Petitioner,

vs.

UNITED STATES OF AMERICA (the appellee below),

Respondent.

# PETITIONER'S REPLY BRIEF

JAMES M. CARSON (Congress Building, Miami, Florida) and VINCENT C. GIBLIN (Ingraham Building, Miami, Florida), Counsel for Petitioner.

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## PREFACE

This reply brief is in two parts. The first part is an amplification of the argument in our original brief of the questions numbered II and III. The second part is an amplification of the argument of the question numbered IV.

### I

We pointed out in the petition and in our supporting brief that the petitioner was specifically charged with having conspired with others to effect the illegal transportation in interstate commerce of Mary Agnes McCullar, Frances Pauline McCullar, Billie Johnson, Ann Bennett, Jessie Asher, Betty Martin Tinker, Frances Jobe and Rachel Louise Clark (the women and girls named in the indictment and in the Government's bill of particulars).

We showed (at pages 7, 8 and 9 of the petition), by appropriate references to the record, that there was no evidence that the petitioner knew of any plan or purpose to effect the interstate transportation of any of the women or girls whose transportation it was charged he conspired to effect. We stated (at page 15 of the petition) that during the course of the oral argument of the case before the appellate court the United States Attorney admitted that the record reflects no evidence that the petitioner had knowledge of any such plan or purpose. The statement has not been denied or contradicted by counsel for the Government.

The admission of the United States Attorney (which

was virtually a confession of error) forced the appellate court, in order to avoid a reversal of the judgment of conviction, to evolve a theory of its own. The court held that (notwithstanding the specific charge preferred against the petitioner) it was not necessary to prove that he knew of and became a party to a conspiracy to effect the illegal transportation of any of the women or girls whose transportation it was charged he conspired to effect, but that it was proper and sufficient to show that he knew of and became a party to a general, comprehensive and continuing conspiracy to effect the illegal transportation of women or girls whenever they should be needed or wanted (without having in contemplation the transportation of any specific woman or girl).

This new theory, a product of judicial ingenuity, had not been advanced by counsel for the Government in either the trial court or the appellate court. Counsel for the petitioner have never been accorded the opportunity to fully and adequately express their views in opposition to such theory.

The conclusion is inescapable, therefore, that the petitioner was charged with and tried for one offense and has been convicted (on appeal) of another. The grand jurors did not charge, and did not intend to charge, the petitioner with having entered into a general, comprehensive and continuing conspiracy to effect the illegal transportation in interstate commerce of women or girls whenever they should be needed or wanted as employees at the night club in question. He was not informed (by the indictment and the bill of particulars) that he was to be tried for having entered into such a general, comprehensive and continuing conspiracy. He

entered the court room to defend himself against the charge which the grand jurors preferred against him and not to defend himself against the charge originated by the Circuit Court of Appeals.

It is now urged by counsel for the Government (in their brief in opposition to the petition for a writ of certiorari), despite the admission made by the United States Attorney before the appellate court (to which we have adverted), that "it is unnecessary . . . to determine whether the conspiracy charged was as narrow in scope as the petitioner insists, since the evidence . . . was sufficient to make petitioner a party either to a general conspiracy to transport girls as needed, or to a narrower one to transport specific individuals."

It is demonstrably true (as we have shown at pages 7, 8 and 9 of the petition), and the United States Attorney was forced to concede, that the record reflects no evidence which shows that the petitioner had knowledge of any plan or purpose to effect the transportation in interstate commerce of Mary Agnes McCullar, Frances Pauline McCullar, Billie Johnson, Ann Bennett, Jessie Asher, Betty Martin Tinker, Frances Jobe or Rachel Louise Clark (the women and girls whose transportation the petitioner was charged by the grand jurors with having conspired to effect).

Even if the evidence showed (and we emphatically insist that it did not) that the petitioner knew of, and became a party to, "a general conspiracy to transport girls as needed," the failure of the Government to prove the charge on which the petitioner was indicted and tried should have resulted in a directed verdict of acquittal.

Rabens v. United States (C. C. A. 4), 146 Fed. 978; United States v. Wills (C. C. A. 3), 36 Fed. (2d) 855; Lowell v. People (Ill.), 82 N. E. 229.

The contention of counsel for the Government is that, while the grand jurors may have charged the petitioner with having committed a specific offense, the failure of the Government to prove that he committed such offense should not result in his acquittal if the evidence was sufficient to show that he committed another offense with which the grand jurors neglected to charge him. We cannot believe that the contention will prevail.

II

We reiterate the assertion made in our original brief that the evidence was utterly insufficient to show that the petitioner knew of and became a party to a general, comprehensive and continuing conspiracy to effect the illegal transportation in interstate commerce of women and girls whenever they should be needed or wanted (without having in contemplation the transportation of any specific woman or girl).

The Government relied solely on circumstantial evidence. Two of the alleged co-conspirators (Evelyn Clark Youst and Rachel Louise Clark) testified as Government witnesses but were unable to provide any positive testimony that the petitioner knew of any plan or purpose to effect the transportation in interstate commerce of women or girls.

The true test by which to determine the value of

circumstantial evidence, in respect to its sufficiency to warrant a conviction in a criminal case, is not whether the proof establishes circumstances which are consistent or which coincide with the hypothesis or theory of the guilt of the accused, but whether the circumstances, satisfactorily established, are of a conclusive character and point so surely and unerringly to the guilt of the accused as to exclude every reasonable hypothesis or theory of his innocence. The force of circumstantial evidence being exclusive in its character, the mere coincidence of a given number of circumstances with the hypothesis or theory of guilt, or the fact that such circumstances concur with, or render possible, the hypothesis or theory of the guilt of the accused, is not a reliable or admissible test, unless the circumstances arise to such a degree of cogency and force as in the order of natural cause and effect to exclude to a moral certainty every other hypothesis except the single one of guilt.

The proof relied on by the Government in this case does not meet the test. All of the evidence adduced is consistent with the theory that the petitioner had no knowledge of any plan or purpose to effect the illegal transportation in interstate commerce of any women or girls. If he did not know of any such plan or purpose, then, of course, he could not have been a party to it. "Without the knowledge, the intent cannot exist. United States v. Falcone, 311 U. S. 205, 85 L. ed. 128, 61 S. Ct. 204, supra. Furthermore, to establish the intent, the evidence of knowledge must be clear, not equivocal. Ibid. This, because charges of conspiracy are not to be made out by piling inference upon inference, thus fashioning what, in that case, was called a dragnet to draw in all substantive crimes." Direct Sales Company v. United

States (decided June 14, 1943), L. ed. Advance Opinions, Vol. 87, No. 18, p. 1227 (text 1231).

Counsel for the Government summarize at pages 6-15 of their brief the evidence which they contend shows the petitioner's knowledge of and participation in an unlawful conspiracy to violate the Mann Act. The summarization is largely a reiteration of the statement of the evidence found at pages 4-10 of our original brief (the accuracy of which is not disputed or questioned).

It will be found that a "dragnet" of vast dimensions was employed by the Government to bring before the trial jury all available evidence showing or tending to show reprehensible and blameworthy conduct on the part of the petitioner. Inference was piled on inference. But the evidence, when concluded, failed to disclose that the petitioner had become a party to any plan or purpose to violate the Mann Act (even if it had revealed other immoral and illegal conduct on his part). The evidence failed to show that he knew of any plan or purpose on the part of others to violate the Mann Act.

## CONCLUSION

We feel that our argument of the other questions stated and argued in our original brief requires no amplification.

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August 31, 1943.